XIVHC—78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(35)

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

Cr.A.No. 1268 OF 2003

[Single Bench; Hon'ble Mr. Justice Dhirendra Mishra]

Appellant (In Jail) Bharat Das, S/o Nanku Ram, Aged about 23 years, Occupation- Agriculture, R/o village Sirwabandha, P.S. Bemetara, Distt. Durg (C.G.)

Vs

Respondent State of Chhattisgarh, Through In-charge Office, Police Station Bemetara, Distt. Durg (C.G.)

Present:
Mr. Prakash Tiwari, Advocate for the appellant.
Mr. S. Yadav, Dy. Govt. Advocate for the respondent-State.

ORAL JUDGMENT

(16th November, 2007)

Per Dhirendra Mishra, J:

This criminal appeal is directed against the judgment of conviction and order of sentence dated 21st November 2003 passed in Sessions Trial No.164/03, whereby learned 2nd Additional Sessions Judge (FTC), Bemetara, has convicted the appellant herein under Section 376 (2) (g) of the I.P.C. and sentenced him to undergo R.I. for 10 years and to pay a fine of Rs.5,000/- and in default of payment of fine to undergo additional R.I. for 2 years.

(36)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश
	Case of the prosecution, in brief, is that, the prosecutrix lodged a repot in the Police Station Bemetara against the appellant and co-accused Chandrakumar alleging therein that 5-6 months prior to lodging of the report when she and her younger brother Salikdas resided alone in her house, appellant Bharat & co-accused Chandrakumar entered in her house and forcibly raped her after lying her on the ground. After Chandrakumar, Bharat also entered the house and committed rape with her and both of them threatened her not to disclose this fact to others. Thereafter, after some days co-accused Chandrakumar again raped her after bringing her to his home. She did not disclose this fact to her parents out of fear, however, she carried pregnancy, which was noticed by her mother and thereafter the report was lodged. During investigation, the prosecutrix was sent for medical examination to Government Hospital, Bemetra, where Dr. Smt. Rajshri Devdhar (P.W.6) examined her and gave her report of Ex.P-7, in which she opined that the prosecutrix was carrying pregnancy of 24 weeks. Birth certificate of the prosecutrix of Ex.P-6 was also seized vide seizure memo of Ex.P-5 wherein date of birth of the prosecutrix is recorded as 23rd December 1987.	

(37)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... **सन् 200**

आदेश पत्रक (पूर्वानुबद्ध)

-3-

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

After completing investigation, charge sheet was field against the appellant and co-accused Chandrakumar under Section 376 (2) (g) of the IPC, however since the age of co-accused Chandrakumar was less than 18 years on the date of commission of the offence, the charge sheet against him was filed before the Juvenile Justice Board.

During trial, the prosecution examined 8 witnesses in all and thereafter statement of the appellant was recorded in which he denied the evidence appearing against him in the prosecution case and pleaded innocence & false implication. However, the learned trial Court after hearing the learned counsel for the respective parties, has convicted and sentenced the appellant as mentioned in paragraph 1 of this judgment.

Learned counsel for the appellant submits that from the evidence of the prosecutrix it would be evident that she was a consenting party to the act of intercourse. The trial court has also recorded a finding in Para 27 of the impugned judgment that from perusal of the case it is evident that the prosecutrix was a consenting party. However, the trial court has convicted the appellant on the ground that the allegation of prosecutrix is that the appellant and co-accused committed

(38)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... **सन् 200**

आदेश पत्रक (पूर्वानुबद्ध)

-4-

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

gang rape in view of Section 114A of the Evidence Act which provides presumption as to absence of consent for the offence punishable under Section 376 (2) (g) where the prosecutrix alleges before the court that she did not consent to the alleged act. It was further argued that the prosecution has utterly failed to prove the age of prosecutrix, as the evidence adduced by the prosecution in this regard in the form of birth certificate is not worth reliance since the Kotwar Bhikadas (PW-5) who has stated that entries in the Kotwari register on the basis of which certif cate was prepared were infact made by the Village Patel on his behest as he is an illiterate person. He was also not able to depose as to exact date of birth entry in the said document. So far as the mother of the prosecutrix Mantan Bai (PW-2) is concerned, though she has claimed the age of the prosecutrix to be 15 years but she has not been able to give the date of birth of the prosecutrix. Reliance is placed on the judgments of this Court in the matters of **Manoj Kumar & others Versus State of M.P. (now Chhattisgarh)** reported in **2007 (2) Crimes 608 (Chhatt.)** and **Mukesh Kumar Vs. State of C.G.** reported in **2007 (3) C.G.L.J. 41.**

On the other hand, learned counsel for the State has supported the impugned judgment and argued that the birth

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

certificate of the prosecutrix has been duly proved by the prosecution by the original kotwari register in which the date of birth of the prosecutrix is mentioned as 23.12.1987. The offence was committed 5-6 months prior to the date of filing of report i.e. 30.7.2003 and thus the age of the prosecutrix at the time of commission of offence was less than 16 years. Conviction of the appellant is under Section 376 (2) (g) and in view of Section 114A of the Act presumption is available that the act was done without the consent of the prosecutrix, as the prosecutrix herself has deposed before the court that the accused persons forcibly raped her.

I have heard learned counsel for the parties. I have perused the record as also the impugned judgment.

Conviction of the appellant is based on the statements of the prosecutrix (PW-1), her mother Mantanbai (PW-2) & Jeevandas (PW-3).

The prosecutrix (PW-1) has deposed that incident is of the month of Magh of this year around 12.00 noon, at that time she and her brother Salikdas were in the home, as her parents had gone to earn livelihood to Village Bourmati. Both the accused persons came to her house and enquired about her brother Salikdas and on finding that she is alone in the house,

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(10)

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

-6-

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश
	took her inside the house, Bharat stood guard outside the house and accused Chandrakumar committed rape with her. Thereafter, accused Chandrakumar went away and Bharat repeated the offence of rape. Thereafter, both of them left her home threatening her on the point of knife not to disclose this fact to others. After 15 days of this incident she was again caught by accused Chandrakumar and raped her on the bank of tank. However, she did not disclose the incident to anyone. When her parents returned to the village and she complained pain in her stomach, her mother abused her and thereafter she narrated the incident to her and lodged the report in the police station. She has further stated that she does not know her date of birth. She has admitted that appellant Bharat is her uncle in relation, whereas, accused Chandrakumar is son of her aunty and as such, her brother. Bharat is married and he has children. At the time of incident also the wife of Bharat was in the village. In the cross-examination she has stated that when she tried to shout, the accused persons gagged her mouth. Both the accused persons dragged her inside the room. In para-15 of her cross-examination she has stated that accused Bharat also raped her	

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(11)

मामला क्रमांक ..... **सन् 200**

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

on the bank of tank, though she did not state this fact in her examination-in-chief.

Mantanbai (PW-2), mother of prosecutrix, has also stated that accused Bharat is her brother-in-law and at the time of incident age of the prosecutrix was 15 years. She had gone to village Bourmati with her husband and her daughter i.e. prosecutrix and son were present in the house, they returned from Bourmati in the month of Baisakh, at that time the prosecutrix complained pain in her stomach and on enquiry she disclosed that she was raped by the appellants on the point of knife and thereafter she lodged the report. In the cross-examination she has admitted that she could not tell the date of birth of her daughter, but her age is 15 years, which is correct. Similar is the statement of Jeevandas (PW-3), who also stated that the prosecutrix told her mother that the appellant herein and co-accused Chandrakumar committed rape with her.

Section 114A of the Evidence Act reads as under:-

> **"114A. Presumption as to absence of consent in certain prosecutions for rape.-** In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or

(12)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

clause (g) of sub-section (2) of section 376 of the Indian Penal Code, 1860 (45 of 1860) where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the Court shall presume that she did not consent."

If we closely scrutinize the evidence of the prosecutrix in the light of Section 114A of the Evidence Act, it is noticed that the prosecutrix has categorically alleged in her deposition that while she was alone in her house, as her parents had gone to earn livelihood, the accused persons, two in number, came to her home and on finding that she is alone in her house committed rape with her one by one. The offence of rape was repeated by co-accused Chandrakumar few days thereafter on the bank of tank. However, in the cross-examination she has improved upon her statement that she was also raped by the accused Bharat on the second occasion. This is a created omission, as in her examination-in-chief she did not mention this fact.

(43)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

After closely scrutinizing the evidence of the prosecutrix it cannot be held that the defence was available to rebut the presumption i.e. Section 114A of the Evidence Act and there is no reason for reaching to a conclusion that the prosecutrix was a consenting party.

So far as the age of the prosecutrix is concerned, the prosecution has adduced the Kotwari register to prove the birth certificate of Ex.P-6. Bhikadas (PW-5), who is the village Kotwar, has stated that kotwari register was seized from him vide seizure memo of Ex.P-5, which bears his signature. He has proved the document of Ex.P-6 on the basis of original register in which at Page 3 the entry regarding birth of the prosecutrix is made. He has further stated that on the basis of entry made in the kotwari register date of birth of the prosecutrix is mentioned in the police station. Though in the cross-examination this witness has stated that since he is an illiterate, therefore, he got the entries made in the kotwari register through the village Patel and therefore, he is not able to tell as to what date is mentioned in the register. However, from perusal of the document of Ex.P-6 it is observed that above entry was made in the kotwari register

(111)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

on 30.12.1987 on the basis of information given by Lendas, grandfather of the prosecutrix.

In the matter of Manoj Kumar & others (supra) considering the fact that father of the prosecutrix was not able to tell the date of birth of the prosecutrix and he has further stated that date of birth was noted by the Kotwar and the same is not with him and her admission in the school was made on the basis of certificate issued by the Kotwar, which was not produced during trial, it has been held by this Court that the prosecution has failed to prove the actual date of birth of the prosecutrix.

In the matter of Mukesh Kumar (supra) considering the fact that the parents of the prosecutrix have simply deposed that their daughter was aged 14 years, however, the basis of entry of date of birth in the school register has not been proved and in these circumstances this Court in Para 8 has held that the same cannot be given much value.

However, in the instant case the original kotwari register has been produced by the Kotwar (PW-5) and document of Ex.P-6 has been prepared on the basis of entry in the kotwari register. The information in the kotwari register is made in the regular course of business and the same is a public

(15)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

-11-

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश
	document and the entry was made at the time of birth i.e. in the year 1987 just seven days after the birth of the prosecutrix and therefore, the above entry cannot be doubted simply because the Kotwar has stated that the entries were infact made by Village Patel at his instance, as he his an illiterate. On the basis of aforesaid observations, I am of the considered opinion that the prosecution has been able to establish the age of the prosecutrix less than 16 years on the date of incident. In the result, the appeal has no substance, the same is liable to be dismissed and it is hereby dismissed. Sd/- Dhirendra Mishra Judge	
Roshan/-		